

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\* \* \*

KESHONE OWENS,

Case No. 2:19-cv-00126-RFB-BNW

Plaintiff,

V.

JAMES DZURENDA, et al.,

## ORDER

## Defendants.

## I. INTRODUCTION

Before the court are three motions: Defendants' Motion to Stay the Proceeding, given a Pending Appeal (ECF No. 70); Plaintiff's Motion for Sanctions (ECF No. 77); and Defendants' Motion Objecting/Appealing the Order of a Magistrate Judge (ECF No. 85).

For the following reasons, the Court denies all three of these motions.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to the Court's March 2, 2020 Screening Order, this case was screened in accordance with 28 U.S.C. § 1915A(a). ECF No. 8. Plaintiff originally brought three claims: a Fourteenth Amendment Due Process claim, an Ex Post Facto Clause claim, and an Eighth Amendment Cruel and Unusual Punishment claim. The Screening Order only allowed Plaintiff's Ex Post Facto claim to proceed. Id. On March 3, 2020, Plaintiff's complaint was filed. ECF No. 9. On September 4, 2020, the parties participated in an Inmate Early Mediation Conference. ECF No. 19. A settlement was not reached.

On December 14, 2020, Parole Board Defendants and NDOC Defendants filed motions to

1 dismiss the proceeding. ECF Nos. 29, 28. Briefing on these motions completed on February 1,  
 2 2021 and March 5, 2021, respectively.

3 On September 20, 2021, the Court held a hearing on Defendants' motions to dismiss. After  
 4 the hearing, the Court issued a "Minutes of Proceedings" in which it issued a Minute Order in  
 5 which it granted the Parole Board Defendants' Motion (ECF No. 29) and denied NDOC  
 6 Defendants' Motion (ECF No. 28) without prejudice. ECF No. 45. The Court also lifted the Order  
 7 staying Discovery (ECF No. 35), and required the parties to submit a joint proposed  
 8 plan/scheduling order by October 4, 2021, and further granted Defense counsel leave to produce  
 9 an "in camera" privilege log. Id. Plaintiff would then have until November 19, 2021 to file an  
 10 amended Complaint with additional parties. Id. The Court's Order stated: "Defendants are  
 11 directed to provide Plaintiff in initial disclosures or through other discovery prior to November 19,  
 12 2021, the names of any employees of NDOC who are or were specifically tasked with recalculating  
 13 sentences after the Nevada Supreme Court's decision in Williams v. State of Nevada Dept of Corr.,  
 14 402 P.3d 1260 (Nev. 2017). On September 27, 2021, Plaintiff moved for appointment of Counsel.  
 15 ECF No. 47. Briefing on Plaintiff's Motion for appointment of Counsel closed on October 18,  
 16 2021.

17 On October 5, 2021, NDOC Defendants ("Defendants") filed an Answer to Plaintiff's  
 18 Complaint. ECF No. 50. On October 12, 2021, Defendants filed a document titled "Unopposed  
 19 Motion and Scheduling Order and Discovery Plan Per Court Order of September 20, 2021 (ECF  
 20 No. 45)." ECF No. 51, 52. On October 13, 2021, the Court granted what it believed to be an  
 21 Unopposed Discovery Plan. ECF No. 54. That same day, Defendants corrected the filing by  
 22 Notice, changing the first word in the title of its filing from "Unopposed" to "Proposed." ECF No.  
 23 55.

24 On October 25, 2021, Plaintiff filed his Opposition to Defendants' Scheduling Order and  
 25 Discovery Plan. ECF No. 57. On November 8, 2021, the Magistrate Judge granted Plaintiff's  
 26 motion for leave to seek counsel and referred him to the Pro Bono Program. ECF No. 59. On  
 27 November 8, 2021, the Magistrate Judge issued a Minute Order construing Plaintiff's Opposition  
 28 as a Motion for Reconsideration. ECF No. 60. The Magistrate Judge denied the Motion for

1 Reconsideration and clarified that Plaintiff would have until February 17, 2022 to “join other  
 2 parties that have direct decision-making authority on how Plaintiff’s credits shall be applied.” ECF  
 3 No. 60.

4 On November 9, 2021, the Transcript of The Court’s September 20, 2021 “Order on  
 5 Motion to Dismiss, Motion Hearing held on 9/20/2021 . . .” was uploaded to the docket. ECF No.  
 6 61. On November 29, 2021, Plaintiff filed a Motion to Compel and a Motion to Extend Time to  
 7 Complete Discovery. ECF No. 62-63. On December 1, 2021, the Magistrate Judge set a hearing  
 8 for January 26, 2021, on Plaintiff’s Discovery related motions. ECF No. 64. On December 9,  
 9 2021, 30 days from the date the hearing transcript was uploaded and 80 days from the date of the  
 10 Court’s Order, Defendants filed a Notice of Appeal. ECF No. 66.

11 On December 13, 2021, Defendants filed a Motion to Stay the Case as there was a pending  
 12 appeal at the Circuit. ECF No. 70. Briefing for this motion ended on January 8, 2022. On January  
 13 10, 2022, Plaintiff filed a Motion for Sanctions, on the grounds that Defendants’ Notice of Appeal  
 14 was untimely. ECF No. 77. Briefing for this motion ended on January 24, 2022. On January 31,  
 15 2022, Plaintiff filed a Motion to Compel. ECF No. 80. Briefing for this motion ended on February  
 16 2, 2022.

17 On February 10, 2022, the Magistrate Judge held a hearing on Plaintiff’s two Motions to  
 18 compel (ECF Nos. 62, 80) and his Motion to Extend Discovery Deadlines (ECF No. 63), the  
 19 transcript of which served as the opinion and order of the Court. ECF No. 84. The Magistrate  
 20 Judge granted Plaintiff’s Motions to compel but stayed the order to allow Defendants to raise  
 21 objections to the District Court Judge in light of the pending appeal and pending motion to stay  
 22 the case. Id. The Magistrate Judge also granted Plaintiff’s Motion to Extend but set timelines  
 23 contingent on the District Court’s ruling on dispositive motions. Id.

24 On February 24, 2022, Defendants’ filed their Objection/Appeal of the Magistrate Court  
 25 Judge’s Order. ECF No. 85. Plaintiff filed no response or reply. On April 7, 2022, Plaintiff  
 26 renewed his Motion for Appointment of Counsel. ECF No. 90. The Magistrate Judge denied  
 27 Plaintiff’s renewed Motion for Appointment of Counsel as moot, since his case was still referred  
 28 to the Pro Bono Program. ECF No. 92.

1

2       **III. DEFENDANTS' MOTION TO STAY THE CASE PENDING APPEAL**

3

4       **A. Legal Standard**

5

6           **i. Motion for a Stay**

7

8       A stay is “not a matter of right, even if irreparable injury might otherwise result.” Virginian  

9       Ry. Co. v. United States, 272 U.S. 658, 672, 47 S. Ct. 222, 71 L. Ed. 463 (1926). “It is instead ‘an

10       exercise of judicial discretion,’ and ‘the propriety of its issue is dependent upon the circumstances

11       of the particular case.’” Nken v. Holder, 556 U.S. 418, 433 (2009) (internal citation marks

12       omitted). The burden is on the moving party to demonstrate circumstances that justify an exercise

13       of that discretion. Id. at 433-34.

14       In Nken, the Supreme Court set forth four factors that a Court must consider: “(1) whether

15       the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether

16       the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will

17       substantially injure the other parties interested in the proceed; and (4) where the public interest

18       lies.” Id. at 434.

19       While establishing irreparable injury on its own does not guarantee a stay will be granted,  

20       a *failure* to establish irreparable injury requires the district court to deny the motion. See Leiva-  

21       Perez v. Holder, 640 F.3d 962, 965 (9th Cir. 2011). The district court is divested of its jurisdiction

22       over the aspects of the case subject to proper appeal. Griggs v. Provident Consumer Disc. Co., 459

23       U.S. 56, 58 (1982). But when a party seeks to appeal a non-appealable order, the district court is

24       not divested of jurisdiction. Id. at 388-389. Furthermore, an appeal is frivolous if its presentation

25       of the district court’s order is “wholly without merit.” Amwest Mortg. Corp. v. Grady, 925 F.2d

26       1162, 1165 (9th Cir. 1991).

27       District Court decisions on motions to stay a proceeding pending appeal are reviewed for

28       an abuse of discretion, but “this standard is somewhat less deferential” in this context. See Lockyer  

v. Mirant Corp., 398 F.3d 1098, 1104 (9th Cir. 2005) (internal citations omitted).

      “If a stay is especially long or its term is indefinite, we require a greater showing to justify

      it.” Hoeun Yong v. INS, 208 F.3d 1116, 1118 (9th Cir. 2000) (holding that although the stay had

1 only lasted five months, its terms were indefinite since the circuit court case, when resolved, could  
 2 be successfully appealed to the Supreme Court).

3 **ii. Appellate Review of Interlocutory Appeals involving Qualified Immunity**  
 4 **concerns**

5 “[A] valid notice of appeal divests the court of jurisdiction over all but tangential matters.”  
 6 Marks v. Clarke, 102 F.3d 1012, 1017 n. 8 (9th Cir. 1996). Section 1291 of Title 28, U.S.C., gives  
 7 courts of appeals jurisdiction over “all final decisions” of district courts except those over which  
 8 the Supreme Court has exclusive appellate jurisdiction. Although there are some exceptions,  
 9 circuit courts do not normally have jurisdiction to hear an appeal of a district court order  
 10 interlocutory order denying a motion to dismiss. United States v. Schemenauer, 394 F.3d 746, 748  
 11 (9th Cir. 2005).

12 Appellate courts generally have jurisdiction over an interlocutory appeal of the district  
 13 court's denial of qualified immunity “notwithstanding the absence of a final judgment.” Mitchell  
 14 v. Forsyth, 472 U.S. 511, 530 (1985); see generally Cohen v. Beneficial Indus. Loan Corp., 337  
 15 U.S. 541, 546, 69 S. Ct. 1221 (1949). In Behrens v. Pelletier, the Supreme Court clarified its  
 16 holding in Mitchell, stating that “an order rejecting the defense of qualified immunity at either the  
 17 dismissal stage or the summary judgment stage is a “final” judgment subject to immediate appeal.”  
 18 516 U.S. 299, 307 (1985). The Court explained that “unless the plaintiff's allegations state a claim  
 19 of violation of clearly established law, a defendant pleading qualified immunity is entitled to  
 20 dismissal before the commencement of discovery.” Id. “[I]f the plaintiff's complaint adequately  
 21 alleges the commission of acts that violated clearly established law,” even if the complaint survives  
 22 dismissal, “the defendant is entitled to summary judgment if discovery fails to uncover evidence  
 23 sufficient to create a genuine issue as to whether the defendant in fact committed those acts.” Id.  
 24 at 306-07 (citing Mitchell, 472 U.S. at 526).

25 Although the qualified immunity defense may be raised multiple times across the pre-trial  
 26 period, the Ninth Circuit warns that a “motion to dismiss on qualified immunity grounds puts the  
 27 court in the difficult position of deciding ‘far-reaching constitutional questions on a non-existent  
 28 factual record.’” Kwai Fun Wong v. United States, 373 F.3d 952, 957 (9th Cir. 2004).

### iii. **Validity of a Notice of Appeal**

In civil cases, the timely filing of a notice of appeal is a strict jurisdictional requirement. Bowles v. Russell, 551 U.S. 205, 214 (2007); see also Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982) (*per curiam*) (internal citations omitted); Hohn v. United States, 524 U.S. 236, 247 (1998). As such, there is no equitable exception to filing a notice of appeal in the manner set forth in the Federal Rules of Appellate Procedure. See, generally, Fed. R. App. P. (4).

In most cases, to commence an appeal of a federal court decision, an appellant must file a notice of appeal with the district clerk within 30 days of entry of the judgment or order they seek to appeal. Fed. R. App. P. (4)(a)(1). Exceptions apply where the moving party is the United States, a federal agency, a current employee of the United States being sued in their official capacity, and in some instances, former employees of the United States; exceptions to this rule also apply to incarcerated movants. See Fed. R. App. P. (4)(a)(2),(c).

If a party is unable to file a notice of appeal in time, they may move for an extension no more than 60 days after entry of the underlying judgment or order, i.e., they are given a 30-day grace period after their initial 30-day period to file a notice of appeal expires. Fed. R. App. P. (4)(a)(5)(A)(i). If they move for an extension of time before the initial 30-day period to file the notice of appeal, a prospective appellant may make their motion *ex parte*, unless the court requires otherwise. (4)(a)(5)(B). Furthermore, requests for extension of time to file an appeal are only granted for good cause or a finding of excusable neglect. Fed. R. App. P. (4)(a)(5)(A)(ii).

The Ninth Circuit strictly limits findings of excusable neglect under Rule 4(a) to “extraordinary” instances where injustice would otherwise result. Oregon v. Champion Int’l Corp., 690 F.2d 1300, 1301 (9th Cir. 1982) (“Extending the excusable neglect exception to clerical errors of counsel or counsel’s staff would be inconsistent with the Advisory Committee’s intent to limit the exception to extraordinary cases and would thwart the Rule’s purpose of promoting finality of judgments.”). Upon a finding of no excusable neglect for a late filing, it is an abuse of discretion for the district court to grant an extension of time. Sprout v. Farmers Ins. Exchange, 681 F.2d 587, 588 (9th Cir. 1982). Thus, the rules contemplate numerous circumstances—and provides clear instructions—for what to do when one is at risk of filing a late notice of appeal:

1 move for an extension. See, e.g., Pettibone v. Cupp, 666 F.2d 333, 335 (9th Cir. 1981) (noting  
 2 that Rule 4(a) “expressly requires” the filing of a motion for extension of time, and “expressly  
 3 requires” that any such motion be filed during the 30-day grace period).

4 **B. Discussion**

5 The district court is divested of its jurisdiction over the aspects of the case subject to proper  
 6 appeal. Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982). To determine if there  
 7 are any matters in this case over which this Court retains jurisdiction, the Court reviewed the status  
 8 of the pending appeal.

9 After Defendants’ commenced an Appeal at the Ninth Circuit, on December 20, 2021, the  
 10 Deputy Clerk filed an Order to Show Cause because a “review of the record suggests that this court  
 11 may lack jurisdiction over this appeal because the notice of appeal was not filed within 30 days  
 12 after entry of the district court’s September 20, 2021 order challenged in this appeal.” The parties  
 13 subsequently responded to the Order to Show Cause, Plaintiff doing so *pro se*. It should be noted  
 14 that on December 12, 2021, Plaintiff filed a letter to the District Court docket, noting that he was  
 15 confused about the status of the appeal.

16 On February 28, 2022, the Ninth Circuit issued an Order discharging its earlier Order to  
 17 Show Cause and allowed the appeal to proceed. The Court “directed” the parties to address in  
 18 their briefs “the basis for this court’s jurisdiction over this appeal.” The Court went on: “In  
 19 particular, the parties should address whether the appeal is timely, see 28 U.S.C. § 2107(a), and  
 20 whether this court has jurisdiction to review the denial of a motion asserting qualified immunity  
 21 where the district court denied the motion without prejudice and without discussing the qualified  
 22 immunity question. This court has determined that the appointment of pro bono counsel in this  
 23 appeal would benefit the court’s review. The court by this order expresses no opinion as to the  
 24 merits of this appeal.”

25 Pursuant to Ninth Circuit precedent, the District Court may independently investigate  
 26 whether an appeal is frivolous or forfeited, even with a timely notice to appeal. See Chuman v.  
 27 Wright, 960 F.2d 104, 105 (9th Cir. 1992). “While a proper appeal from a denial of qualified  
 28 immunity automatically divests the district court of jurisdiction to require the appealing defendants

1 to appear for trial, a frivolous or forfeited appeal does not automatically divest the district court of  
 2 jurisdiction. Accordingly, a district court may certify in writing that the appeal is frivolous or  
 3 waived. Without such certification, the trial is automatically delayed until disposition of the  
 4 appeal.” Id.

5 The timely filing of a notice of appeal is a strict jurisdictional requirement. Bowles v.  
 6 Russell, 551 U.S. 205, 214 (2007); see also Griggs v. Provident Consumer Discount Co., 459 U.S.  
 7 56, 61 (1982) (*per curiam*) (internal citations omitted); Hohn v. United States, 524 U.S. 236, 247  
 8 (1998). On December 9, 2021, 30 days from the date the hearing transcript was uploaded and 80  
 9 days from the date of the Court’s Order, Defendants filed a Notice of Appeal.

10 Here, Defendants waived their *right to appeal* this Court’s denial of their qualified  
 11 immunity defense, without prejudice, at the Motion to Dismiss stage of pretrial proceedings.  
 12 Defendants failed both to file a timely appeal or move at any time for a request for extension,  
 13 flouting both sets of requirements in the Federal Rules of Appellate Procedure, Rule 4. See Fed.  
 14 R. App. P. (4)(a)(1), (a)(5)(A)(i). As such, this Court does not reach the secondary analysis of  
 15 whether Defendant’s *qualified immunity* claims were frivolous or waived, or even apply the  
 16 remaining Nken factors.

17 Although Defendants’ own filings suggest that the operative order was issued on  
 18 September 20, 2021, Defendants now argue that the window to file an appeal of that order began  
 19 thirty days from the docketing of the hearing transcript rather than the order itself. This is false.

20 There is a process for ordering transcripts after a hearing in this jurisdiction, referenced in  
 21 the Local Rules and detailed on this Court’s website. The Defendants argument is premised on  
 22 the assumption that all such orders will necessarily have transcripts completed and filed. However,  
 23 there is no such requirement in the Federal Rules of Civil Procedure or the Local Rules of this  
 24 District.

25 Indeed, as already noted, there is a process for ordering transcripts—a process that would  
 26 be redundant if the Local Rules *required* the filing of transcripts. Transcripts are not loaded to the  
 27 docket as a matter of course. Transcripts are only loaded to the docket if a party orders a transcript  
 28 and requests delivery in that manner, or if a presiding judge, at her discretion, orders the transcript

1 be loaded. The Local Rules state that transcripts of court proceedings are only provided to the  
 2 parties if they order and pay for the transcripts; these fees are non-taxable. LR 54-3. The only  
 3 type of hearing where the Court itself must order a transcript is an Evidentiary Hearing in a Death  
 4 Penalty case. LSR 5-3 (emphasis added). The Court website has a section explaining how a party  
 5 or counsel may order a transcript of a court proceeding. ORDERING TRANSCRIPTS – DISTRICT OF  
 6 NEVADA, <https://www.nvd.uscourts.gov/case-information/ordering-transcripts> (last visited  
 7 September 30, 2022).

8 Defendants argue that since the Court’s minutes from the September 20, 2021 hearing  
 9 states that the hearing transcript reflects the “opinion” and “order” of the court, it has 30 days from  
 10 the date the transcript is filed on the docket to file an appeal. According to Defendants, the 30-  
 11 day window to file an appeal only starts when the transcript has been filed.

12 Defendants cite to two Ninth Circuit cases for two related propositions. First, they cite to  
 13 National Distribution Agency v. Nationwide Mut. Ins. Co., 117 F.3d 432, 433 (9th Cir. 1997) for  
 14 the proposition that orders are only final and appealable when they show that the court intends for  
 15 the ruling to be its final act on the matter. They then argue that the Ninth Circuit applied this  
 16 reasoning in Meyer v. Portfolio Recovery Associates, LLC, 707 F.3d 1036, 1041 (9th Cir. 2012)  
 17 to hold that a minute order was not the final decision of a trial court.

18 The Court finds that the holdings in National Distribution and Meyer are related to one  
 19 another but are irrelevant to the present case. In National Distribution, the Ninth Circuit found it  
 20 did not have jurisdiction over the appeal of a court order, because the order was not final. 117 F.3d  
 21 at 434. Specifically, the underlying order stated: “The Court may amend or amplify this order  
 22 with a more specific statement of the grounds for its decision.” Id. In Meyer, the Ninth Circuit  
 23 also found it did not have jurisdiction based on the appeal of a minute order issued after a hearing,  
 24 because at the hearing, the District Court Judge stated that a written order would follow. 707 F.3d  
 25 at 1040.

26 The order in this case was not conditional. Defendants’ cited cases establish that a minute  
 27 order is unappealable if the District Court, through its choice of language, reveals that the minute  
 28 order does not represent a final decision. Here, the Court did not state at the September 20, 2021

1 hearing that a written order would follow or that the decision reached at the hearing would be  
 2 supplemented or amended by later order or document. The Court's 20, 2021 Order, appearing on  
 3 the docket at ECF No. 45, fully captured its decision to deny Defendants' motion to dismiss: it  
 4 was denied. Because this appeal turns on qualified immunity, interlocutory appeal is allowed in  
 5 this case. Behrens v. Pelletier, 516 U.S. at 407. The Court issued its order on September 20,  
 6 2021. Thirty days from that date is October 20, 2021. Defendants had an opportunity to order the  
 7 transcript by that date but chose not to do so.

8 To the degree Defendants were unable to file their Notice of Appeal by October 20, 2021—  
 9 because they could not receive the transcript of the hearing in time, had trouble paying for the  
 10 same, or some other reason—Defendants were required to move for an extension of time by  
 11 November 20, 2021, as all litigants are required to do. Fed. R. App. P. (4)(a)(5)(A)(i). The Court  
 12 would have then granted such a motion if it found good cause or excusable neglect for the delay.  
 13 Id; see also Sprout v. Farmers Ins. Exchange, 681 F.2d 587, 588 (9th Cir. 1982). Instead,  
 14 Defendants filed an untimely notice of appeal 80 days after the Court issued its order.

15 In writing this order, the Court certifies that this appeal is waived and denies Defendants'  
 16 stay request. Failure to do so would amount to an abuse of discretion, as this Court would be  
 17 violating longstanding Ninth Circuit and Supreme Court precedent that an appellate court lacks  
 18 jurisdiction over any untimely filed appeal. See Lockyer v. Mirant Corp., 398 F.3d 1098, 1104  
 19 (9th Cir. 2005) (internal citations omitted). Moreover, in this case, the Court denied the motion to  
 20 dismiss without prejudice to allow for the defense of qualified immunity to be raised again in the  
 21 litigation while also allowing Plaintiff an opportunity to fairly respond to any such arguments,  
 22 especially where the Court finds that the Defendants have information in their position that the  
 23 Plaintiff does not have but is entitled to receive.

24

25

#### IV. PLAINTIFF'S MOTION FOR SANCTIONS

26

27

##### A. Legal Standard

28

A court on its own initiative may order a party "to show cause why conduct specifically

1 described in its order has not violated Rule 11(b).” Fed. R. Civ. P. 11(c)(3). Sanctions imposed  
 2 may include “an order directing payment to the movant of part or all of the reasonable attorney's  
 3 fees and other expenses directly resulting from the violation,” subject to some limitations. See  
 4 Fed. R. Civ. P. 11(c)(5).

5 Sanctions for improper conduct “must not be filed or be presented to the court if the  
 6 challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected  
 7 within 21 days after service or within another time the court sets.” Fed. R. Civ. P. 11(c)(2). This  
 8 is Rule 11’s “safe harbor” provision. This provision states that although a motion for sanctions  
 9 must be served like any other motion, it must not be filed or be presented to the court if the  
 10 challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected  
 11 within 21 days after service or within another time the court sets.” Fed. R. Civ. P. 11(c)(2). “The  
 12 purpose of the safe harbor . . . is to give the offending party the opportunity . . . to withdraw the  
 13 offending pleading and thereby escape sanctions.” Barber v. Miller, 146 F.3d 707, 710 (9th Cir.  
 14 1998) (emphasis in original).

15 The analysis under Rule 11, however, does not require the Court to make a finding of bad  
 16 faith. “[W]hile the narrow exceptions to the American Rule effectively limit a court's inherent  
 17 power to impose attorney's fees as a sanction to cases in which a litigant has engaged in bad-faith  
 18 conduct or willful disobedience of a court's orders, many of the other mechanisms permit a court  
 19 to impose attorney's fees as a sanction for conduct [that] merely fails to meet a reasonableness  
 20 standard. Rule 11, for example, imposes an objective standard of reasonable inquiry which does  
 21 not mandate a finding of bad faith.” Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991) (internal  
 22 citation omitted).

23 **B. Discussion**

24 Plaintiff argues that Defendants lied to the court when they represented their appeal as  
 25 “timely” and that they should be sanctioned for “their bad faith and unnecessary delay.”  
 26 Defendants argue that because Plaintiff did not send them the motion for sanctions 21 days before  
 27 filing it with the Court, Plaintiff's motion must be dismissed for violating the safe harbor provision  
 28 in Rule 11.

1           The Ninth Circuit strictly enforces Rule 11's safe harbor provision. See Holgate v.  
 2 Baldwin, 425 F.3d 671, 678 (9th Cir. 2005); see also Barber v. Miller, 146 F.3d 707, 710 (9th Cir.  
 3 1998) ("An award of sanctions cannot be upheld" where the movant does not comply with the  
 4 twenty-one day notice requirement); Winterrowd v. Am. Gen. Annuity Ins. Co., 556 F.3d 815, 826  
 5 (9th Cir. 2009) (finding "no basis" for awarding sanctions where the moving party violated safe  
 6 harbor provision); Radcliffe v. Rainbow Constr. Co., 254 F.3d 772, 789 (9th Cir. 2001) (reversing  
 7 district court's grant of Rule 11 sanctions where the moving party did not comply with the safe  
 8 harbor provision).

9           "[S]anctions compensate a party for the costs of enforcing the rule when the party taking  
 10 the challenged position has refused to withdraw or correct it." Islamic Shura Council of S. Cal. v.  
 11 FBI, 757 F.3d 870 (9th Cir. 1990) (internal citation omitted). Here, Plaintiff never gave  
 12 Defendants the chance to withdraw their untimely appeal, in the manner required by the procedural  
 13 rules, because he did not serve Defendants with his motion 21 days before filing it with the Court.  
 14 Although Plaintiff is *pro se*, and the Court leniently views his filings including those that violate  
 15 the rules of civil procedure, the Court must deny his motion for sanctions for violating the safe  
 16 harbor provision of Rule 11. See Holgate v. Baldwin, 425 F.3d 671, 678 (9th Cir. 2005); see also  
 17 Barber v. Miller, 146 F.3d 707, 710 (9th Cir. 1998) (noting that failure to comply with the safe  
 18 harbor provision precludes an award of Rule 11 sanctions).

19

20           **V. DEFENDANTS' MOTION OBJECTING/APPEALING THE ORDER OF A**  
 21 **MAGISTRATE COURT JUDGE**

22

23           **A. Legal Standard**

24           A magistrate judge may decide non-dispositive pretrial matters. Fed. R. Civ. P. 72(a); 28  
 25 U.S.C. § 636(b)(1)(A). The magistrate judge's order generally operates as a final determination.  
 26 LR IB 1-3. But if a party timely objects to the magistrate judge's order, a district court judge must  
 27 review the order and "set aside any part [...] that is clearly erroneous or is contrary to law." Fed.  
 28 R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A); LR IB 3-1(a). "Clear error occurs when 'the reviewing

1 court on the entire record is left with the definite and firm conviction that a mistake has been  
 2 committed.”” Smith v. Clark Cty. Sch. Dist., 727 F.3d 950, 950 (9th Cir. 2013) (quoting United  
 3 States v. Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). “An order is  
 4 contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of  
 5 procedure.” Jadwin v. Cty. of Kern, 767 F. Supp. 2d 1069, 1110-11 (E.D. Cal. 2011) (internal  
 6 quotation marks and citations omitted).

7 However, in reviewing the order, the court applies the deferential abuse-of-discretion  
 8 standard; the magistrate judge's order will be reversed only if the magistrate judge abused her  
 9 broad discretion. Columbia Pictures, Inc. v. Bunnell, 245 F.R.D. 443, 446 (C.D. Cal. 2007); see  
 10 also Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975) (holding  
 11 a judge abuses their discretion only when their decision is contrary to law or clear error based on  
 12 the evidence).

13 **B. Discussion**

14 Magistrate Judge Weksler granted Plaintiff's motions to compel and his motion for  
 15 extension of time.

16 Plaintiff filed a motion to compel the limited discovery ordered by this Court in its  
 17 September 21, 2021 minute order: “Defendants are directed to provide Plaintiff in initial  
 18 disclosures or through other discovery prior to November 19, 2021, the names of any employees  
 19 of NDOC who are or were specifically tasked with recalculating sentences after the Nevada  
 20 Supreme Court's decision in Williams v. State of Nevada Dept of Corr., 402 P.3d 1260 (Nev.  
 21 2017).” See ECF No. 45. Magistrate Judge Weksler construed the motion as a motion to enforce  
 22 a prior order (the Court's September 21, 2021 Minute Order) and granted it. She noted that if  
 23 Defendants believed that they had complied with that order, they could make that response within  
 24 the Discovery process.

25 Next, Judge Weksler found that the appeal order from the Ninth Circuit did not explicitly  
 26 address matters of qualified immunity as it related to discovery, and that there was no controlling  
 27 precedent confirming that discovery would be automatically stayed in light of such an appeal. In  
 28 issuing her decision, Judge Weksler noted that the Court may certify in writing that the appeal is

1 frivolous or waived; absent that, the matter could be stayed. Judge Weksler took notice of  
2 Defendants' motion to stay the whole proceeding and pointed out that Defendants could have  
3 alternatively moved to stay discovery more specifically. Judge Weksler further stayed the  
4 effective date of her order in light of Defendants' then pending motion to stay the case, which was  
5 yet to be decided by the Court.

6 The Court cannot find that Magistrate Judge Weksler acted arbitrarily or capriciously.  
7 Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975). However,  
8 because the Court denies Defendants' motion to stay, in writing, as waived, the Court also cannot  
9 adopt the reasoning in Judge Weksler's order in full.

10 First, Defendants' objection is denied as to Judge Weksler's granting of Plaintiff's motion  
11 to enforce a prior order (as she fairly construed Plaintiff's motion to compel to be a motion to  
12 enforce a prior order). See United States v. Qazi, 975 F.3d 989, 993 (9th Cir. 2020) (noting that  
13 "courts are specifically directed to construe *pro se* pleadings liberally" and that "[t]his duty applies  
14 equally to *pro se* motions and with special force to filings from *pro se* inmates.") (internal citations  
15 and quotation marks omitted).

16 Second, Defendants' remaining objections must be denied as moot, as the Court does not  
17 reach the question of whether discovery can be automatically stayed when a case is appealed on  
18 qualified immunity grounds because the Court finds that here, the appeal was untimely. It has  
19 written its observation to that effect in writing, noting the appeal as waived.

20  
21 **VI. CONCLUSION**  
22

23 **IT IS THEREFORE ORDERED** that Defendants motion to stay the case pending appeal  
24 (ECF No. 70) is DENIED, Plaintiff's motion for sanctions is DENIED (ECF No. 77), and  
25 Defendants' motion objecting/appealing the Magistrate Judge's order (ECF No. 85) is DENIED  
26 in part on the merits and in part as moot. The matter is referred to the Magistrate Judge to identify  
27 new deadlines in accordance with this order.  
28

1           It has come to the Court's attention that efforts to find Plaintiff counsel were paused while  
2 the Court considered Defendants' motion for a stay pending appeal. Therefore, **IT IS FURTHER**  
3 **ORDERED** that the matter is STAYED for ninety days and **RE-REFERRED** to the Pro Bono  
4 Program for assignment of counsel.  
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7           DATED September 30, 2022.

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9           **RICHARD F. BOULWARE, II**  
10           **UNITED STATES DISTRICT JUDGE**

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